

## **ABORIGINAL RIGHTS AS NATURAL RIGHTS**

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### **ABSTRACT/RESUME**

Recognizing the natural law theories of such scholars as H.L.A. Hart and John Finnis, the author argues that aboriginal rights are human rights in the same manner as freedom of expression and freedom of conscience. He develops a new theory based on the rights and obligations of communities in relation to the lands they occupy. After demonstrating the independent moral validity of aboriginal rights, he then examines the extent to which Canadian law has recognized these rights.

Tenant compte des théories en matière de droit naturel formulées par des chercheurs tels que H.L.A. Hart et John Finnis, l'auteur soutient que les droits aborigènes sont des droits humains de la même famille que la liberté d'expression et la liberté de conscience. Il propose ensuite une théorie nouvelle fondée sur les droits et les obligations des communautés, compte tenu des terres qu'elles occupent. Après avoir démontré la validité morale indépendante du principe des droits aborigènes, il étudie dans quelle mesure la loi canadienne reconnaît ces droits.

All arguments concerning the existence of a necessary connection between law and morality have likely been exhausted for the time being (cf Hart, 1961; Fuller, 1955). As little new light can be shed on the general controversy, both "positivists" and natural law proponents are perhaps wise to offer their respective analyses of specific social and legal issues. Those not excited by intellectual debate, but still vitally concerned with such issues, can judge for themselves as to which perspective is most in touch with reality.

This paper is about an issue of "rights". At the outset, therefore, the reader is invited to consider modern "rights-talk".

Ordinary human discourse reveals that we think of rights as existing at two distinct levels. Certain property, contractual or statutory rights we imagine to be purely creatures of law. We consider an assignment of such rights (perhaps better termed "powers") to persons, to be essential for the smooth running of things in society, but we rarely characterize their substantive content as being either moral or immoral. Upon further reflection, of course, some of us might be willing to grant that ensuring the smooth running of things is in itself a sort of moral purpose.<sup>1</sup>

We all posit a much closer connection with morality in those rights we call human rights. The very term "human rights" suggests that some rights inhere in the human person, not by virtue of their proclamation by the positive law, but by virtue of certain realities within what might be termed the pre-legal human condition.

Thus, we often speak of the positive law as ignoring or protecting these rights, but not as extinguishing or creating them. We are further inclined to use these fundamental rights as criteria for the evaluation of existing laws.

The view that certain rights or notions of justice inhere in the human condition prior to the existence of any system of positive law may quite properly be termed a natural law position. The sources and particularities of this position needs to be explored with reference to modern natural law theorists.

The natural law theory thus developed will be used to discern the extent to which aboriginal rights are fundamental or human rights in the sense briefly outlined above. Aboriginal rights here refer to those rights which are commonly said to be held by native peoples over the lands they have occupied since time immemorial.<sup>2</sup>

A further note on methodology is appropriate. A recent article by J.C. Smith (1974) has analysed aboriginal rights as a concept autonomous from existing positive law. Smith rightly asserts that aboriginal rights must be viewed from two perspectives: that of the inter-societal property regime which existed between servient societies (native communities) and dominant societies (European nation-states), and that of the intra-societal property regime of present-day Canada. The inter-societal property regime was one based upon the first use and occupation of lands, while the intra-societal regime is essentially a complex system of rights which are purely legal in the sense already described.

Smith claims that for mainly non-moral reasons Europeans chose, in absorbing servient societies, to recognize the inter-societal property regime (ibid: 13). However, no governing authority has since created the legal machinery

needed to incorporate this recognition within the intra-societal property regime. Consequently, Canadian governments today still must choose between carrying out this task or repudiating the initial recognition of aboriginal title. The latter course, Smith concludes, would be "unfair and unjust" (ibid: 16).

Smith's argument is cited at length for two reasons. Firstly, it effectively demonstrates that aboriginal rights must be analysed from the historical inter-societal perspective before any understanding of the present-day intra-societal problem can be achieved.

Secondly, the article provides questions which must be answered at both levels of analysis. Given that colonial policy tended to recognize the land rights of native communities for non-moral reasons, what moral reasons for doing so existed, and what is the continuing source of that moral obligation? As well, what would be the fair and just resolution of the intra-societal dilemma? How, in other words, ought a moral right of native ownership be recognized within Canadian property law?

In sum, then, a modern view of natural law will first be articulated, and then used to develop responses to the two questions posed above in their proper order. The paper's conclusion will be an attempt to render all that went before it useful within the realm of positive law; the feasibility of applying a natural law concept of aboriginal rights under the new Canadian Constitution will be explored.

## MODERN NATURAL LAW THEORY

It may be best to begin by directly confronting the traditional criticisms of natural law which have prompted modern reformulations of the theory.

Natural law, it has been said, claims that human beings have certain pre-ordained purposes, purposes which lead to conclusions about how men ought to behave and what rules ought to govern them. To speak of something as having a set purpose, however, is nonsensical unless one is referring to something which has been created for a particular reason or task. Thus, natural law is said to rest upon what everyone concedes to be an unprovable premise: the existence of a Creator.

In the absence of proof of a Creator, one is left to make factual observations about human nature which will lead to conclusions about what conditions are best for men, which will in turn lead to conclusions about best conduct, rules, etc. This, David Hume and others have argued, one cannot do. One cannot derive an "ought" from an "is"; normative statements can never be deduced from factual ones.<sup>3</sup>

Modern natural law theorists have attempted to circumvent rather than directly refute these objections. Hart, for example, argues that any teleological view of man is nonsensical. He merely asserts that there is one aim upon which most persons happen to agree: survival.

From "the simple contingent fact" that "most men most of the time wish to survive", Hart derives a "minimum content" of natural law (1961:188). To further their aim of survival, says Hart, men in a crowded world of scarce

resources must adopt some form of social organization. Within any form of community, moreover, there must be, among others, rules restricting the use of violence and establishing set, stable patterns of ownership or use of resources. Otherwise, chaos dangerous to survival will result.

Hart's assignment of a special status to survival in the affairs of men is well grounded in common sense. Whatever notions of "good" may lie immanent in the human condition awaiting discovery by more elaborate theories of natural law, survival is an essential pre-condition for the attainment of any of them. The avoidance of death and physical harm thus carries an over-riding significance in moral decision-making; if one acts contrary to certain forms of good for the sake of one's own or others' survival, one is at least keeping open the possibility of seeking these "goods" on another day.<sup>4</sup>

Yet Hart himself does an inadequate job of explaining precisely how the mere preponderance of men's desires for survival can be the sole source of objective moral obligation. "Most men most of the time" also desire knowledge and friends, and one wonders why Hart was not just as willing to use these "contingent facts" as the basis of his theory. One is also left not knowing how to view a man who rejects survival as his aim within this minimum content of natural law.

Other theorists<sup>5</sup> have addressed the "ought-is" dilemma in a more satisfying way. Any theory concerning external reality, they point out, must ultimately rest upon the adaptations of human consciousness and language to that reality. Certainly we may sometimes have to re-orientate ourselves upon receiving data from the world which contradicts previously held images of reality, but any survey of human experience shows that certain basic structures of human thought and language do not significantly change from time to time or culture to culture. Natural law merely asserts that our basic adaptations to the external reality of the human condition are no more or less reliable than those we have made to the reality of the physical universe.

The essential point is this: it is ultimately artificial to draw a distinction between our observations about what a man is and what he ought to be, for the human consciousness, in its contact with reality, has not developed these notions apart from one another. We learn what a man is as we learn what he ought to be; one is not derived from the other (*ibid*: 129).

John Finnis (1980, Chapter 4) thus postulates the existence of a series of basic human goods: survival, knowledge, play, sociability, practical reasonability (personal autonomy), religion and aesthetic beauty. These goods are not derived from facts and are not facts from which goods may be derived; they are underivable self-evident human values. The values are not necessarily pre-ordained by a Creator but it would make little sense to call them optional, for any human who refuses to participate in them is failing to seek what is good in human terms.

What is really meant by a self-evident human value is that all human understanding of, and language about, human reality would collapse without these values at their base. An example given by Finnis should clarify this point.

The statement "knowledge is a human good" may be restated as "humans

ought to seek knowledge". The contradiction of this is that "humans ought not to seek knowledge", but the person who sincerely utters such a statement is himself trying to establish the truth on the matter at hand. Any denial that knowledge is a human good is thus bound to be "operationally self-refuting" within the limits of human thought and language (ibid:74).

One human good worth examining in detail is practical reasonability. Practical reasoning is to be valued because only our reason can aid us to choose properly among the various ways of furthering other goods. Just as importantly, a person who freely exercises his reason to this end establishes his own inner integrity and personal autonomy as an individual (ibid:88).

A principle of practical reasoning so obvious that Finnis leaves it unstated, is that actions essential for the attainment of human good are to be performed. One such action is the formation of communities.

As Hart notes, communities are first of all essential if the human good of survival is to be furthered. As well, the forms of cooperation which characterize any community properly so-called, are a manifestation of the basic good of sociability.

The applications of practical reasoning within a community are governed by several principles, only one of which need concern us here. We may term as the primary requirement of justice the imperative that one ought not demonstrate arbitrary preference as to persons. If one ought to further human goods, then it follows that one must respect each human being as a locus of actual or possible participation in those goods.<sup>6</sup>

Now, one has more knowledge of, and power over, one's own condition, so it is not arbitrary but indeed sensible to devote most of one's energy to the furtherance of one's own good and that of those for whom one has already established responsibility by prior action (for example, friends and family). As well, even well-meaning interference in the affairs of another can in itself endanger that person's pursuit of individuality (ibid:107). All that is required is that in any situation in which one's decisions may affect another person's participation in human goods, one takes that person into account as deserving of respect.

The primary principle of justice is therefore of enormous significance to those in authority within a community, for their decisions necessarily affect a broader range of persons than those of the ordinary citizen. In choosing a plan of action, leaders must carefully consider its effects on all members of the community. Success in this endeavour will yield "the common good": "the securing of a whole ensemble of material and other conditions which tend to favour the personal development of each individual" (ibid: 162).

It is not difficult to derive a notion of human rights from Finnis' view of the common good, for indeed the two are very nearly interchangeable (ibid: 210-218). An application of the primary principle of justice to community affairs tells us that within a community, each individual is entitled to participate in human goods to an extent that does not restrict his fellows' participation in them.

Even human rights, therefore, can rarely be deemed absolute. Since know-

ledge and personal autonomy are basic values, for example, respect for what is commonly called the right of free speech will normally be an aspect of the common good. Yet some forms of speech can threaten the security or stability of a community. As some degree of security and stability is required for the pursuit of human goods, restraints on these forms of speech are surely justified.

### Rights of Property Within a Community

It will be useful to further examine the way in which the notion of the common good conditions "rights" with reference to rights of property.

Finnis views all material resources as the common stock of mankind. He is led to do so by the simple fact that these resources did not and do not "come into the world attached to a particular owner" (ibid: 173). Every human requires access to material resources if he is to flourish, and Finnis naturally favours a distribution of the common stock which will further the common good.

Like Hart, however, Finnis realizes that a stable institution of property is necessary within a community if life-threatening chaos is to be avoided. Finnis is inclined to favour a system of private ownership since he views such a system as one most likely to produce an increase in the fruits of the common stock and to contribute to the good of personal autonomy (ibid:170). His claims in this regard are obviously open to question, and he admits as much.

What is most important to note is that in the normal sense, a community will establish some regime of property which in its view best serves the values Finnis refers to. A person's right of property over a particular object or resource is thus ultimately created by his community's positive laws. Such a right can with complete justice be altered as long as the goods of stability, productivity, just distribution, and personal autonomy are thereby served.

When discussing aboriginal rights, the question becomes whether a right of property can arise as between communities in the absence of positive law: If this question is answered in the affirmative, one must then decide how to deal justly with lands that do come into a community "already attached to a particular owner". We can only resolve these issues, however, if we keep in mind that any notion of property is conditioned by the aspects of the common good listed in the preceding paragraph.

### MORALITY WITHIN THE "COMMUNITY OF COMMUNITIES"

Finnis says little about the moral rights and duties of communities vis-a-vis one another, but the elements of his theory give us some direction in developing such a normative framework.<sup>7</sup>

We should begin by affirming that any notion of the good of communities is unintelligible unless understood to refer ultimately to the common good of the individual members of mankind. Yet if an end-participation of individuals in human goods is to be valued, then so surely is an indispensable means of attaining it. As communities are the means by which persons collaborate in the fostering of the common good, they are in themselves worthy of respect.

"Show no arbitrary preference as to communities" is in fact a corollary of the imperative that one ought not demonstrate an arbitrary preference as to persons. Communities, like individuals, are all in some degree "centres of human flourishing".

Again, the implications of such a principle are limited. Obviously, those entrusted with responsibility within a community have obligations towards its members far surpassing those they have towards the members of other communities. One who has the power and authority to further the common good within a limited group ought not to squander all his energy in pondering the broader problems of all mankind.

The leaders of communities who are powerful enough to directly affect other communities, however, must use that power in accordance with the primary principle of justice. In other words, a community which could be harmed by the actions of another community is entitled to have the common good of its members taken into consideration by the more powerful community's decision-makers. This requirement is no more than a logical extension of the maxim already developed in an earlier section of this paper: as the range of persons affected by one's decisions grows, so too does the range of persons entitled to one's active concern and respect.

Yet a judgment by a powerful community that arrangements within other communities are not furthering the common good of their members will seldom justify interference in their affairs. Paternalism of this sort is to be avoided for several reasons. Firstly, our knowledge and judgments of other communities, like our knowledge and judgments of other individuals, are bound to be inferior to those concerning our own situation. What may appear from afar to be "repressive political arrangements" or "mere superstitions" may be validly chosen ways of participating in the human goods of sociability or religion.

Secondly, the freedom of a community to choose its own ways of furthering its common good can be an aspect of the basic human good of personal autonomy. Patterns of communal activity are, after all, the aggregate of many individually chosen actions.

Thirdly, and most importantly, unwanted interference by one community in the affairs of another can lead to violence.

Violence between communities is often destructive of all values in a manner far greater than other phenomena of the human condition. Within various cultures, war has been seen to encourage what are undoubtedly forms of human good (such as courage, self-sacrifice, comradeship and discipline), but practical reasoning would seem to indicate that these values are better fostered by methods which do not simultaneously threaten the pre-eminent value of survival. Of course, a community is justified in resorting to force when its survival or that of some of its members is already threatened by the aggression of another community.<sup>8</sup>

To avoid the overriding evil of war and thereby leaving themselves free for the secure pursuit of the common good, communities must strive to introduce some degree of stability and predictability into their affairs. If a pattern of activity aimed at this purpose establishes itself among enough communities it

may come to be viewed as a custom or institution of the community of communities. Such an institution is an inter-societal property regime.

### The Moral Content of An Inter-Societal Property Regime

Communities all require a share of the world's resources if their members are to prosper. The validity of Hart's thesis at the level of a single community, however, extends to the "community of communities". If the common stock of mankind were always up for grabs among communities, constant warfare would be the end result.

All that is thus established, of course, is that some form of property regime among communities is morally required insofar as it enhances the stability which permits human development. In one sense, morality need not answer the question of precisely what form the property regime ought to take. If communities were able to agree among themselves that a certain relationship between a community and resources constituted ownership, then that agreement could be termed moral because of its contribution to inter-societal stability.

Any "agreement" imposed by some communities on others would naturally be subjected to a different analysis. As well, experience over time may indicate that a certain property regime resulted in a distribution of the common stock which deprived much of mankind access to vital resources. In such a case, communities would be morally obliged to settle upon a more just pattern of ownership. However, we shall see later that a community which unilaterally attempted to alter the distribution of resources established by a regime of property could be condemned in all but the most extreme circumstances.

### THE INTER-SOCIETAL PROPERTY REGIME OF NATIVE COMMUNITIES AND EUROPEAN NATION-STATES

If the sovereign communities of today have settled on the type of relationship that should constitute ownership between communities and resources (and this is highly doubtful), to impute any such agreement to the native communities and European states of a few centuries ago would be to create a complete and rather useless fiction. Before Europeans began their struggle for the North American continent, the two cultures were unaware of one another's existence.

Native communities as between themselves clearly held long standing use and occupation of lands to establish a relationship of ownership between the community and an area so used and occupied.<sup>9</sup> Evidence gathered by anthropologists and presented in Canadian aboriginal rights cases such as *Calder v. Attorney-General of British Columbia*<sup>10</sup> and *Hamlet of Baker Lake v. Minister of Indian Affairs*<sup>11</sup> indicates that tribes occupied definite territories and defended them as their own. Certainly, some tribes (notably the Iroquois) waged wars of territorial aggrandizement, but there is no reason to doubt that such tribes realized that they were in fact taking territories from other native communities (Jennings and Spencer, 1977:404).

The vital question here is whether Europeans were morally obliged to respect this pre-existing institution of property in the absence of any express agreement between themselves and Indians, that first use and occupation should establish ownership.

We can tentatively give an affirmative response to this question. Part of the normative content of any notion of property lies, as we have seen, in its introduction of stability into human affairs. Inter-societal stability is beneficial in two related ways. Firstly, quarrels between communities are avoided and peace thus ensured. Secondly, a community which can be reasonably secure in the possession of a share of the common stock can go on to use this share in the fostering of the common good of its members.

Now, a situation in which the first communities to use and occupy lands simply continue to do so is a stable one, one just as stable as would exist under a property regime established by agreement. Therefore, we are entitled to require of someone who would seek to disturb this status quo a good reason for doing so. The reason(s) must be compelling enough to justify the threat posed to both peace between communities and to the pursuit of the common good within the communities already occupying lands.

Some communities are powerful enough to acquire territories without causing war; they can quickly eliminate any violent resistance they encounter. If it be asked why these communities must still be concerned with the welfare of others, one need only refer to the primary principle of justice as applied to communities, discussed earlier. Once European nations had the power and the inclination to make authoritative decisions directly affecting Indian communities, they acquired the obligation to take the common good of their members into account in making any such decision.

We should now examine how compelling the reasons for dispossessing the first users and occupiers of North American lands could be.

## JUSTIFICATIONS FOR DISPOSSESSING NATIVE COMMUNITIES

### Quality of Community

Most Europeans of the 17th, 18th and 19th centuries would likely have assented to the general proposition that the first communities to occupy and use land should be undisturbed in their possession. Unfortunately, many settlers tended to assume that Indians were irrational savages incapable of forming communities properly so-called.<sup>12</sup>

Any assertion that the Indian was a mere brute need not detain us here. The charge is disproven by the refutation of its corollary. Vitoria, for example, established the rationality of Indians by pointing to the existence of "a definite method in their communal affairs" (1917: 27).

Within and among North American tribes, in fact, there was often a high degree of religious, social and political organization. Internally, tribes could be rigidly structured, with each member fulfilling a well defined role. In their external affairs, tribes such as the Huron or Iroquois formed confederations or

leagues. Councils composed of tribal representatives governed these organizations (Jennings and Spencer, 1977:369).

Certainly, then, Indian tribes exhibited forms of mutual collaboration which would qualify them as communities in Finnis' sense of the term. It would be best to re-assert, moreover, that these were societies sufficiently organized to "occupy definite territories... to the exclusion of other societies."<sup>13</sup>

Indian tribes were not, of course, civil nation-states in a fashion that Europeans would recognize, and this perhaps explains their frequent failure to recognize them as land-possessing communities. This attitude was a demonstration of arbitrary preference as to communities; many non-European societies did not exhibit the trappings of state sovereignty because they developed apart from European political culture, but this was hardly a reason for denying their ability to possess lands. Christian Wolff seemed to have recognized this when he defended the rights of "groups of families, even if not in the form of civil states" to occupy "previously desert lands" without interference from neighbouring states (Wolff, 1934:159). His was a lonely voice in the ethnocentric age of conquest.

#### Quality of Use

A more sophisticated justification for dispossession centered on the quality of the use made by Indians of the lands they occupied.

Henry Brackenridge asserted that Indians could not possibly lay claim to lands merely because they had hunted on them. Such a situation would yield absurdity: "a single tribe could claim an entire continent once they had pursued an antelope across it" (Washburn, 1964:113).

Brackenridge's concern was an important one. Certainly no Indian or European could claim to own land merely because he had been the first to see it in the course of his hunting or explorations. If this were not so, "a few quick runners with keen eyesight" could indeed appropriate a huge portion of the world's resources to the exclusion of most of mankind (ibid:114). Such a result would be contrary to the common good and to common sense.

Yet evidence already presented should make clear that Brackenridge's application of this sound principle to Indian tribes was based upon a misapprehension of facts. Indians did not pursue antelope across the continent. They tended to hunt and gather within reasonably well defined areas.

In the northern parts of what is now Canada, these areas were delineated by mountains and drainage basins. Among Western tribes such as the Nishgas and Tlinglits, man-made markers as well as natural barriers designated tribal hunting domains.

To Wolff, a use in alternation of specific lands for hunting and gathering was "an intended use of lands" sufficient to yield property in them (1934:159).

Yet the fact that Indians hunted and gathered within boundaries would not at all have impressed John Locke. Locke viewed any use of land for hunting or gathering as a "non-use" when it came to the matter of determining land ownership. For Locke the decisive and relevant act of ownership was "the mixing of

one's labour with a physical thing" (Laslett, 1960:304). An Indian who chased and killed a deer apparently mixed his labour in the deer, but not in the land on which he had chased and killed (ibid:305).

Agricultural communities, therefore, could with perfect natural justice move hunters and gatherers off the lands they occupied.<sup>14</sup>

As a purely preliminary matter we may note that some North American tribes did practice agriculture. In what is now Canada, the Huron, Ottawa and Algonquin all developed modified farming economies (Jennings and Spencer, 1977:369).

Even if we grant (as we must) that most Indians were hunters and gatherers, the conceptual basis of Locke's argument remains weak. It is difficult to see how a man who kills the animals which feed and wander upon a given tract of land, or who gathers the berries that grow on it, has in any relevant sense mixed his labour in the land any less than the man who has planted seeds in its soil; the land is an indispensable element in the labour of both. Locke may have felt that the act of cultivation joined man and soil in a metaphysical sense which modern minds would find difficult to accept.

More likely, however, is the idea that Locke's theory of land use was inextricably connected with his views on economic value. He noted that

in the wild woods and uncultivated waste of America left to nature, without any tillage or husbandry, 1000 acres will yield the needy and wretched inhabitants as much as 10 acres in Devonshire. Therefore, a King of a large and fruitful territory feeds lodges and is clad worse than a day labourer in England (Laslett, 1960:312).

The use Indians made of North American lands was not completely wasteful; it sustained their communities for centuries. Locke's objection was that it did not produce the surplus value which can lead to trade and technological progress. Locke, like Finnis - and myself - viewed the world's resources as the common stock of mankind. He therefore postulated a duty to use those resources as effectively as possible.

The argument that one ought to use one's resources in ways which further the common good of mankind will meet with no objection here. A use of resources which benefits others as well as oneself is always to be preferred to one which merely sustains bare survival.

Yet if such principles were applied indiscriminately within the "community of communities", the very stability which any inter-societal institution should create would be destroyed. No community's technology and productivity is identical with another's; if farmers can dispossess hunters, can farmers with tractors dispossess farmers with horses? A certain level of productivity would have to be designated and agreed upon by communities as constituting "use" sufficient to yield property. One suspects that even Locke would be in agreement here.

*Any* removal of a community from land for the admitted good of develop-

ing mankind's common stock, moreover, would necessarily threaten other human goods. By now it should be clear that communities are to be valued as more than mere vehicles for the efficient production of wealth. A particular way of doing things in the material realm sustains a whole range of human values apart from survival or physical well-being. The very freedom of a community to choose its own pattern of economic development can contribute to an authentic sense of self-determination in its members. As well, this freedom allows a choice of economic activities which "fit in" with additional chosen methods of participating in other human goods. It is well known, for example, that hunting is an integral part of the social, religious and cultural life of Indian tribes.

Now, one cannot accept the premise that the world's resources are ultimately common stock and assert that communities could *never* be justified in redistributing some of the resources of one community among themselves. If one is to recall that in moral decision-making survival is often of over-riding significance, and if the forms of the common good referred to in the paragraphs above are also taken into consideration, the following guide as to when such redistribution could properly occur emerges.

If a community is hoarding and making grossly inadequate use of a large amount of resources while the survival or viability of other communities is threatened by their lack of access to such resources, then that community may be forced to allow development or distribution of its share in the common stock. For the sake of peace and stability, just what constitutes "grossly inadequate use" should whenever possible be agreed upon by communities, but one could imagine a case sufficiently grave to justify action without prior agreement.

No such circumstances existed when the colonization of America began.<sup>15</sup> England and France initially competed for North American territory, not to prevent disaster at home, but to obtain greater power and economic profit abroad.

Admittedly, by the 19th century, English colonization had in part become a response to poverty and overpopulation in the mother country; one need only recall in this regard the assisted emigration of the victims of the bush famines. Yet by this time most of what is now Central and Eastern Canada was already under Imperial control, it is hard to believe that a more intensive settlement and development of these areas could not possibly have been undertaken in preference to rapid westward expansion. Indeed, the treaty-making efforts of the British, and later Canadian, authorities show that they themselves recognized that the taking of Indian lands without prior consultation and agreement was not a moral or practical necessity.

#### Just War

We have seen that the use of force by a community to protect its members from violent aggression is justified.

In what is now the United States, settlers were quick to seize on attacks by Indians as an excuse for driving them further back into the wilderness. They did

so without considering that the Indians may have been caused prior offence by persons occupying what they believed was their land (Smith, 1959:20-21). As well, they naturally did not consider Wolff's injunction that in a just war one may take from an enemy only as much territory as is necessary to prevent a recurrence of aggression.

In Canada, the issue is somewhat irrelevant. Indian attacks were rare, as were "Indian wars". In part this issue may be ascribed to the Royal Proclamation of 1763, which by announcing the Crown's intention to respect Indian possession of lands, appears to have had its intended effect of securing peace along the frontier.

### Consent

Each Indian community could of course voluntarily surrender its inter-societal property right. In Canada these surrenders were accomplished through treaties under which tribes received certain benefits from the Crown in exchange for lands. Treaty rights are beyond the scope of this paper, but the matter of consensual surrender ought not to be raised without reference to some pertinent words of Vitoria.

"A consent to the taking of possessions given in fear or ignorance", said Vitoria, "*is in truth no consent*" (1917:148). One might also include that communities cannot rightly take advantage of or encourage these evils (negations of human goods) for the sake of obtaining perceived benefits. Some descriptions of treaty signings suggest that the encouragement of fear or ignorance sometimes played a large role in obtaining the surrender of lands.<sup>16</sup> The mere existence of a treaty does not conclusively establish that aboriginal title is no longer an issue within a given territory.

Aboriginal rights then, can be traced to, or derived from, objective notions of the common good. While under certain circumstances the abrogation of this right could also have been justified in terms of the common good, such circumstances simply did not exist at the time colonists were making their way across the continent.

Such circumstances may exist now. The mere passage of time cannot cause a moral right to weaken or disappear, but the force and content of aboriginal rights must be examined in the light of present-day conditions.

## THE INTRA-SOCIETAL DILEMMA

### On Whether the Entry of Native Communities Into the Canadian Community Extinguished Their Rights of Ownership

Native communities above the 49th parallel have now been absorbed into the larger Canadian polity. The process and results of this absorption have been complex and do not lend themselves easily to moral analysis. Obviously, natural law theory cannot deem as just all acts accomplished by force merely because their effects appear irreversible. On the other hand, terming the subjection of

Indians to Canadian sovereignty a sheer act of force would be a gross oversimplification. Native peoples have accepted many of the benefits that come with being citizens of a modern state and members of a technologically advanced society. Natives themselves have often worked for and obtained these benefits through participation in the Canadian political process.

It is unnecessary, however, to render final verdict on the justice of the process which made Indians citizens of Canada. Any such judgment would not dictate a particular resolution of the problem of aboriginal title.

If the subjection of native communities to Canadian sovereignty was unjust, then that is surely all the more reason for allowing them to retain whatever aspects of their autonomy are compatible with this accomplished fact. To say that the successful assertion of sovereignty gives the Crown "underlying title" to all Indian lands is to make a purely legal and tautological statement which leaves unanswered the question of whether this underlying title (that is, sovereignty over Indians) can properly be used to abrogate or diminish the native communities' rights of ownership over lands. The answer to this question must be sought beyond both the concept of Canadian sovereignty and the Canadian legal system.

Moreover, if Indians can truthfully be said to have voluntarily consented to their becoming Canadian citizens, this act cannot automatically be deemed a consent to the abrogation of all of the pre-existing rights of their communities. Put in terms of modern "rights-talk", a submission to governmental authority does not in itself amount to a submission to the denial of those rights which are fundamentally, to the ignoring, that is, of those rights which have arisen within the human condition prior to the existence of the system of positive law. Earlier sections of this paper have demonstrated that aboriginal rights are such rights.

Now, some may quite legitimately be puzzled and concerned by the prospect of there being "human" rights within a community which are confined to a relatively small group of its members.

This apprehension initially seems well-founded. It will be remembered that the promotion of human rights in a community is nothing more or less than the furtherance of basic human goods in accordance with the principle of justice that each person is entitled to equal concern and respect in the planning of community affairs. Thus, one might argue that in the distribution of the common stock, positive property laws ought not to accord one group "special treatment".

Yet if human rights are identical with the just furtherance of human goods, then it would seem that a notion of simplistic equality would have no place in this enterprise. It is by now trite to say that true equality consists, not in treating all cases alike, but in treating like cases alike, and treating cases which are different in relevant respects differently.

The "cases" of Indians and other citizens are indeed different. Most Canadians have ultimately acquired their rights over particular lands from the state. Governing authorities first obtained lands for the Canadian community and now allow private citizens to exercise legal rights of property over these lands once

they have fulfilled certain conditions (such as, purchase or inheritance). Indians, meanwhile, established a right of ownership prior to the existence of the state or its laws. To ignore the fact that some lands have come into the Canadian community already attached to possessors would be to deny Indians "the equal concern and respect" due them as members of that community.<sup>17</sup>

#### Aboriginal Rights and the Positive Law

As aboriginal rights are compatible with the common good of the Canadian community, Canadian positive law should reflect this reality. To do so it need only recognize Indian communities as owners.

Canadian law has not accomplished this task, in spite of its attenuated recognition of aboriginal title. In the case of *St. Catherine's Milling and Lumber Co. v. The Queen*, aboriginal title was described as "a burden on the title of the Crown" and a personal usufructuary right of occupancy alienable only to the Crown.<sup>18</sup> What is meant by "a personal usufruct" is unclear. Some commentators have suggested that the holders of this usufruct are allowed to develop the lands they occupy to their full economic potential.<sup>19</sup> In *Hamlet of Baker Lake v. Minister of Indian Affairs*, however, these rights were referred to as if they might be restricted to traditional native uses of the lands: hunting and fishing. As well, they were deemed not to be "surface rights" which could be protected against the leasing of mining rights under the *Territorial Lands Act*.<sup>20</sup>

The only definite concern to emerge from all of this is that aboriginal title gives something substantially less to its holders than the largest "bundle of rights" which other private owners can exercise over lands.

J.C. Smith has explained this discrepancy in the following manner. The courts, says Smith (1974:13) have been placed in an uncomfortable position by the state's simultaneous recognition of aboriginal title and refusal to integrate this recognition into the intra-societal property regime. Given the existence of treaties and the Royal Proclamation of 1763, courts could not deem as trespassers native occupiers of unceded lands. Yet neither could they deem them holders of estates in fee simple in the absence of a more explicit statutory directive to that effect. To do so would be to usurp the legislative function.

The restriction on alienation, meanwhile, can be traced to the Royal Proclamation of 1763. It forbade the direct purchase by private subjects of Indian lands with the purpose of protecting Indians from "great frauds and abuses".<sup>21</sup>

The justifications for limiting the content of aboriginal title is not ultimately at issue here. Ownership of land in the abstract may be taken to signify the right to use or dispose of land to the exclusion of all others. If it is agreed that (a) Indian communities established a moral right to such ownership as first users and occupiers and have carried this right into the present and, (b) are therefore entitled to have that right protected by positive law, then (c) they are entitled to the full rights of private owners under Canadian law, which amount to "ownership of land" as defined above.

As full owners native communities could help foster the common good of the larger community. Through full economic development or sale to those with the capital necessary for development, their lands could provide an increase in the fruits of the common stock. Alternately, native communities might choose to preserve their traditional patterns of economic activity as a way of strengthening their autonomous social, religious and cultural life. This would be no less valid a form of participation in the human goods than the former option.

#### On Whether the State May Ever Extinguish a Particular Aboriginal Title to Land Without Consent

The state is sometimes not prepared to allow private owners to develop their lands as they please. It may have some plan which in its view will enhance the common good to such an extent that the unilateral abrogation of private rights will be justified.

At common law the taking of property by the state under prerogative necessitates the payment of compensation: *Newcastle Breweries v. The King*.<sup>22</sup> For expropriation without compensation, express words in a statute are required: *City of Montreal v. Montreal Harbour Commission*.<sup>23</sup>

Aboriginal rights have traditionally been in a much more vulnerable position. If the words of Judson, J., in the Calder case be any authority, the state may extinguish aboriginal title without compensation by enactments which in their operation are inconsistent with the existence of such title<sup>24</sup> (see my conclusion for suggestions as to how the new Canadian Constitution may have changed this situation).

Even in the case of most "ordinary" private owners, expropriation without compensation is bound to be unjust. This is so, not because natural justice requires a system of private ownership, but because the state, once it decides upon and institutes such a system, creates reasonable expectations that the rights obtained under it will be respected (Finnis, 1980:178). Compensation for expropriation preserves this sense of stability within the system.

Aboriginal rights are in no sense created by the positive law. Thus, the question should be whether the positive law can ever be used to abrogate these rights, with or without compensation.

The criterion developed earlier suggests that this question can be answered in the affirmative. Even a community's "pre-legal" or "moral" right of property can be abridged when it refuses access to unused or grossly underused resources which are urgently needed to sustain the physical well-being of other persons. If this is true of a community's right of property as between other communities, it surely holds true in the case of native communities under Canadian sovereignty.

We are still left with the problem of defining how modern conditions can justify the abrogation of a community's right to choose its own methods of using its resources. A precise definition is obviously impossible. Suffice it to say that in a dangerous, crowded world of great ecological and economic inter-

dependency, such conditions are imaginable. If lands were needed for some strategic or economic purpose vital to Canada's viability as a community, then expropriation with compensation could perhaps be justified.

As a matter of topical interest, it may be observed that the need to develop Northern oil and gas reserves does not meet the test outlined above.<sup>25</sup> If the lands of Inuit or Eskimos are greatly desired for this purpose, then the expensive but just route of negotiation and purchase should be followed.

#### CONCLUSION: ABORIGINAL RIGHTS AND THE NEW CONSTITUTION

We now briefly turn from a consideration of moral obligations to one of factual possibilities.

Section 52 of the *Constitution Act*, 1982, confers on that document's provisions of the status of paramount law. One such provision, section 35(1), recognizes "existing" aboriginal rights. Here we are concerned with whether the phrase "existing rights" bears an interpretation which could bring a natural law perspective into play.

We have seen that the common law has singled out three features of aboriginal title:

- (1) It is an exclusive usufructuary right of occupancy;
- (2) It is alienable only to the Crown;
- (3) It is extinguishable by unilateral acts of the Crown (i.e., the federal government).

It is (3) which creates the most difficulty. If it is a part of the definition of aboriginal rights that they can be abrogated by governmental actions, then in what way can a guarantee of these rights protect them from such actions?

The Crown's right of extinguishment is surely better viewed, not as a defining feature of aboriginal title, but as a limitation on it which Parliament sought to abolish through section 35. In this case the word existing would imply that statutes of Parliament enacted after 1982 could not have the effect of extinguishing aboriginal title. However, statutory restrictions or abrogations of such title in effect on the date of the *Constitution Act's* proclamation, would still retain their validity. In this view, the word existing means "existing in law".

Yet a reading of sections 35 and 52 together would suggest that neither the content of, nor the limits on, aboriginal rights should be ascertained with reference to existing positive law. If, as section 52 implies, both rights under the Charter of Rights and Freedoms and aboriginal rights are to serve as a standard which all other laws (present or future) must respect, then it can make little sense to look to existing positive law for the content of that evaluative standard. Courts should thus be prepared to look beyond the positive law for autonomous conceptions of rights. An obvious source of such conceptions is natural law.

It may be objected that this approach is acceptable when dealing with Charter rights, but the word "existing" in section 35 simply cannot be ignored. Yet as Brian Slattery has pointed out, it is possible to take "existing"

as meaning something other than "existing in law". Section 35 may be read to require that the rights in question have a *factual* basis which was in existence at the date of the *Constitution Act's* proclamation. Thus, a native community claiming title to a territory would have to prove that it had been in exclusive possession of the territory on the advent of British sovereignty and had not surrendered their lands by treaty.<sup>26</sup>

Those who feel the foregoing analysis is sound, may wish to argue that courts should view section 35 as an invitation to reconsider the *entire* content of aboriginal rights apart from the common law. Unfortunately, such arguments are doomed to failure. The barrier to the growth of aboriginal title into a more substantial right of property remains. In the absence of a much more explicit statutory directive, courts are likely to continue to view aboriginal title as a usufructuary right of occupancy alienable only to the Crown.<sup>27</sup>

Surely, though, sections 35 and 52 have some remedial effect. If Slattery's analysis is correct, then at least aboriginal rights are autonomous rights insofar as they are no longer subject to abrogation by existing or future legislation, as they were held to be in the *Calder* case. True, only the attenuated form of rights enshrined in the judicial doctrine of aboriginal title may thereby be protected from the reach of the state's positive law. Yet the effect of the natural law is felt. Law and morality are in some small measure reconciled.

#### NOTES

1. For a detailed defense of this view see Fuller, 1955.
2. This definition is *not* meant to be a legal one; it is provided to distinguish aboriginal land rights from other forms of native rights.
3. Both these objections are presented in Anthony Battaglia's *Toward a Reformulation of Natural Law* (New York, Seabury Press, 1981).
4. For strong disagreement with the view that basic human values can in any way be "ranked" in order of importance, see John Finnis, 1980:111-118.
5. I refer here to Battaglia, Finnis and Arthur C. Danto, who in his essays on natural law has developed a concept of "normic humanity" to describe the way in which human language adapts itself to human moral behaviour. See, for example, Arthur C. Danto, "Human Nature and Natural Law" in *Law and Philosophy*, 1964.
6. Finnis, 1980:106 "Primary principle of Justice" is a term of my own creation; Finnis does not use it.
7. The use of the term "community" rather than "nation-state" is deliberate. The actors with which this paper is concerned were in any relevant sense equals, but Indian tribes were arguably not nation-states. Community is an

appropriately neutral term that can describe both tribes and European countries.

8. For views on just war see Christian Freiherr von Wolff, 1927.
9. This assertion is also made in Smith, 1974:7.
10. (1973), 34 D.L.R. (3d) 145 (S.C.C.)
11. [1980] 1 F.C. 518 (F.C. Trial Div.)
12. For examples of this attitude see Wilcomb E. Washburn "The Moral and Legal Justifications for Dispossessing the Indians" in James M. Smith 1959:19-21.
13. *Hamlet of Baker Lake v. Minister of Indian Affairs* [1980] 1 F.C. 558.
14. This argument was also made in the famous American aboriginal rights case of *Worcester v. State of Georgia* (1832), 6 Peters 515, 31 U.S. Rep. 350 (U.S.S.C.).
15. Wilcomb Washburn points out that England's population was a mere three million at the height of the Age of Conquest, Smith, 1959:22N.
16. See for example, Richard Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Department of Indian and Northern Affairs, Research Branch, 1980), Chapter 1.
17. A former Indian Lands Claim Commissioner has made this same point in forceful but rather different terms; see Lloyd Barber, 1974.
18. (1888), 14 A. C. 46 (P.C.) at 54.
19. See for example, James O'Reilly "Territorial Rights of Indians", *Canadian Bar Association Papers*, 1968 at 36-41.
20. *Hamlet of Baker Lake v. Minister of Indian Affairs*, 1 F.C. 518 at 577.
21. Cited in Brian Slattery, *Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories*, Doctoral Dissertation, Faculty of Law, Oxford University, 1979 at 235.
22. [1920] 1 K.B. 854.
23. [1926] 1 D.L.R. 840 The ratios of both cases are extracted from Justice Halls' judgment in the Calder case.

24. *Calder v. Attorney-General of British Columbia*, 34 D.L.R. (3d) 145 at 156-168.
25. See Article 12 of Convention 107 Concerning *the Protection and Integration of Indigenous and Other Tribal Populations in Independent Countries* adopted at the 40th Session of the International Labour Organization in 1957. It states that native peoples may be removed from their lands only "as an exceptional measure" for some reason of over-riding strategic or economic importance. See also Peter Cumming, 1975:191. Cumming asserts that the need for Northern development does not call for "exceptional measures". Canada has not ratified Convention 107.
26. Brian Slattery, "The Constitutional Guarantee of Aboriginal Rights", Draft Copy, Osgoode Hall Law School, 1982, at 8.
27. Rather than integrating Indian rights of ownership into the legal property regime, the federal government now seems inclined to follow a political process of negotiation of land claims. See "Native Claims: Policy Processes and Perspectives", Ottawa, Office of Native Claims, 1978.

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